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MICHAEL RUDAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

**No. 79-685**

DRESSER INDUSTRIES, INC., A CORPORATION, ON ITS OWN  
BEHALF AND ON BEHALF OF CERTAIN DRESSER EMPLOYEES,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## REPLY BRIEF.

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**PREFATORY NOTE.**

Certain misstatements of fact and mis-characterizations of the Record contained within Respondent's Brief necessitate a reply by the Petitioner. Although Respondent has not raised novel issues in its Brief, Petitioner is nonetheless constrained, with this Court's indulgence, to correct those inaccuracies set forth within Respondent's Brief.

## ARGUMENT.

Respondent has in its Brief seriously mis-characterized both the issues before this Court and the history of the present controversy. Respondent, in a flagrant attempt to divert this Court's attention from those crucial issues raised by Petitioner, has submitted to this Court certain questions which, though convenient to Respondent, do not honestly reflect those matters truly at issue. Respondent suggests, contrary to the Record, that the suit filed by Petitioner in the district court constituted a collateral attack upon SEC and grand jury investigations, and certain subpoenae issued in tandem by each in April of 1978. Respondent's mis-characterization of Petitioner's action belies the true nature of Petitioner's suit. It has been and remains Petitioner's purpose to enforce a commitment which Respondent has willfully repudiated. Yet, as was true in both the district court and the court of appeals, Respondent has mis-characterized Petitioner's action in an attempt to avoid, by administrative and procedural indirection, those moral and legal responsibilities embodied in the commitment extended to Petitioner as an inducement to participation in the "Voluntary Disclosure Program." Therefore, Respondent's suggestion of a collateral attack upon "lawful" agency investigations is incorrect. Petitioner merely asks this Honorable Court to recognize its right to enforce a commitment which Respondent in large part admits entering into, and which the Respondent has now breached.

Respondent has likewise chosen in its Statement of Facts to mis-characterize Petitioner's suit as a pre-enforcement attack upon agency investigations, rather than that which it truly is, a suit to enforce a governmental promise. In so doing, Respondent takes certain unwarranted liberties with the Record which require further correction by Petitioner.

In its narrative Statement, Respondent refers to portions of a May, 1976, Report from the SEC to a Congressional Committee which it claims details the history of the "Voluntary Disclosure Program" and the imputed knowledge of all participants therein. Respondent mischaracterizes the Report.<sup>1</sup> More importantly, Respondent fails to advise this Court that the Report referred to by it was issued four months *after* Petitioner entered into the agreement of confidentiality with the SEC, at a time when all of the participants, including the SEC, were still feeling their way to a *modus operandi* for the program.<sup>2</sup>

Respondent then broadly summarizes the meeting between Petitioner and the SEC in January of 1976 at which time Petitioner was induced to participate in the Voluntary Disclosure Program pursuant to assurances of confidentiality. Though contrary to the Record, Respondent nonetheless claims that it,

1. Respondent fails to disclose that the SEC changed its policy and decided to disclose information submitted to it under the Voluntary Disclosure Program—compare SEC FOI Release No. 11 (John A. Jenkins, June 11, 1975) with the cited footnote on page 9 of the Report. Moreover, the Respondent's quote applies only to the possibility of *domestic* payments, as the entire excerpt from the Report shows (Footnote 6, p. 8):

"Although the Voluntary Disclosure Program was originally conceived to apply only to foreign payment problems, in practice it has been applied to disclosures of certain domestic problems as well. In addition to requiring appropriate disclosure under the federal securities laws, the Commission refers matters that appear to represent violations of domestic law to the appropriate law enforcement authorities."

2. Respondent would now have this Court believe that the Voluntary Disclosure Program was designed to cause SEC registrants to meet their disclosure *obligations*, by disclosing *material* facts. This is not the way the Program was presented to Petitioner or others. SEC Commissioner Sommers recommended on June 24, 1975, a balanced pattern of disclosure of payments to foreign nationals, without identifying "names of recipients and countries," since the results of such disclosure could be "horrendous" including "in some cases, perhaps even loss of life." These disclosures should be made even if not material "as a matter of good corporate relations." Loomis further admitted, in a letter to Congressman Nix (August 5, 1975), that "we have never determined that such disclosure is generally required, particularly as to past transactions."

rather than Dresser, received a commitment which was subsequently breached. With feigned indignation, Respondent asserts that it, and not the Petitioner, has been wronged. Petitioner respectfully suggests that this misleading and patently inaccurate recitation of the events underlying the present litigation constitutes a further subterfuge designed to avoid a fair consideration of Respondent's unlawful conduct.<sup>3</sup> Petitioner is therefore constrained to point out the foregoing inaccuracies so that this Honorable Court may have a clear understanding of those matters in issue.

In its argument, Respondent contends that its dealings with the Petitioner have been in accord with its statutory mandate. Respondent suggests that it may at its discretion, and without fear of judicial interference, infringe the rights of its citizenry and disregard all moral and legal obligations under the pretext of legislative purpose. Indeed, Respondent suggests that an agency, vested with extensive (and often unrestrained) investigative powers, may utilize its statutory authority to unlawfully pursue its lawful purpose without risk of judicial sanction. Petitioner respectfully submits that the law of this court does not grant to government agents immunity from such conduct in excess of lawful authority. Petitioner further suggests that the Freedom of Information Act, to the extent that it may be construed to authorize the executive branch to endanger the lives of American citizens abroad, denies to those citizens their rights

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3. No court thus far has permitted Petitioner the opportunity to prove the existence and extent of Respondent's commitment. All rulings below have been in the context of motions pursuant to FRCP 12(b) and summary subpoena enforcement proceedings. Nonetheless, the SEC even admits the existence of an agreement concerning confidentiality in the affidavit of Barbara Brandon. In this affidavit Ms. Brandon states:

"The [SEC] staff agreed to conduct an initial review of such documents on the premises of Dresser's counsel, and that any notes taken at that time would not include the names of individuals or foreign countries."

Although this does not state the full scope of the agreement, even this commitment was subsequently repudiated by the staff.

under the Fifth Amendment to the Constitution. Yet it is clear that such conduct in the present case has and continues to go un thwarted. Thus far, Respondent has successfully avoided effective judicial scrutiny of its conduct by utilization of its subpoena power and those statutory protections which shield it from judicial review. Indeed, the Respondent's commitment of confidentiality has all but been forgotten by reason of this subterfuge.

In an attempt to ameliorate the repudiation of its prior commitment, Respondent suggests that Petitioner's employees threatened by imminent public disclosure of that sensitive information compiled by Petitioner under governmental assurances of confidentiality would receive notice of any release of such information shortly before its actual release. By this accommodation, Respondent suggests that Petitioner's overseas employees and their families would be adequately protected from any threat of harm resulting from the disclosure of that confidential information in question. Respondent's suggestion, if indeed serious, evidences a startling lack of awareness of global turbulence manifest in the ever present threat of harm to U. S. citizens abroad. Apparently unable to avert disclosure under the Freedom of Information Act 5 U. S. C. § 552(a), Petitioner's employees and their families, by virtue of Respondent's repudiation of its commitment, live under constant threat of harm from the precipitous disclosure of that information compiled by Dresser under assurances of confidentiality. Respondent nonetheless suggests that, for its part, notice prior to disclosure will justify it dismissing its responsibility for all prospective consequences.

Respondent further justifies a repudiation of its prior commitment by suggesting that the Petitioner was perhaps unwise, or possibly naive, in accepting assurances from an agent of the government who may not have been vested with authority to commit Respondent to the preservation of the confidentiality of that information compiled by Petitioner under the Voluntary

Disclosure Program.<sup>4</sup> Respondent further suggests that no governmental agent, regardless of his position, has authority to "waive the agency's statutory authority to investigate violations of law." Again, Respondent engages in a distortion of the Record. Petitioner does not claim that immunity from further investigation or prosecution was guaranteed by Respondent. The commitment provided by Respondent was one of confidentiality, and only when Respondent elected to disavow this commitment was Petitioner compelled to seek judicial assistance. Yet premised upon its liberal mis-characterization of its commitment, Respondent disavows any obligation to Petitioner by voicing approval of the Fifth Circuit caveat that one who deals with the government does so at his own risk. Respondent therefore excuses its misconduct by raising a claim of bureaucratic indiscretion, the consequences of which will ultimately be borne by Petitioner's employees and their families. Respondent's contention notwithstanding, a disclaimer of responsibility and a gratuitous warning against dealing with the government cannot excuse Respondent's dishonor of its commitment. Clearly, the government cannot simply ignore conduct of its agents which jeopardizes the well-being of U. S. citizens. The government must remain accountable in such instances regardless of agency disclaimers of responsibility. Petitioner therefore respectfully suggests that Respondent's disavowal of its commitment cannot preclude Petitioner from seeking and obtaining judicial relief in enforcing Respondent's commitment of confidentiality.

Respondent also contends that Petitioner does not have standing to assert the rights of its employees and their families under the Privacy Act, 5 U. S. C. § 552(a). Because Petitioner is a corporation without statutory rights under the Privacy Act, Respondent concludes, as did the court of appeals, that Petitioner may not represent its employees even though they may be

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4. No court has thus far entertained proofs on the question of agency authority. It may well be that Respondent's agent retained the authority to bind Respondent.

otherwise unable to assert their own rights under the Act. Petitioner again states that it does not claim a corporate right under the Privacy Act. Petitioner does however claim a right to protect its employees and their families by acting on their behalf and exhausting every possible means to prevent arbitrary disclosure of that confidential information which the Petitioner, as well as 400 other corporate entrants into the Voluntary Disclosure Program, compiled pursuant to governmental assurances of confidentiality. It cannot be denied that Petitioner, although itself without specific statutory rights, may nonetheless assert the rights of others whom it adequately represents. Petitioner, therefore, suggests that it is entitled to represent its employees and their families in asserting their individual rights as guaranteed under the Privacy Act.

#### CONCLUSION.

WHEREFORE, by reason of the conflict between the decision of the Court of Appeals for the Fifth Circuit and the decisions of this Court and the several circuits, Dresser prays that its Petition for Writ of Certiorari be granted.

Respectfully submitted,  
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